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CIMB ISLAMIC BANK BHD v. WELLCOM COMMUNICATIONS (NS) SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
HASNAH MOHAMMED HASHIM JCA
B HANIPAH FARIKULLAH JCA
[CIVIL APPEAL NO: W-02(IM)-1888-09-2018]
13 FEBRUARY 2019

C ***COMPANY LAW:*** *Judicial management – Application for – Dismissal of application for judicial management – Applicant obtained stay of dismissal of judicial management order – Effect of – Whether brought judicial management order to life – Whether applicant obtained statutory interim protection – Whether abuse of process of court – Whether there was element of bona fide – Companies Act 2016, ss. 404, 409 & 411*

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The respondents had filed a judicial management order under s. 404 of the Companies Act 2016 ('CA'), the effect of which would effectively stop anybody from filing any action against the respondents for a period of six months and/or as the court may order. However, the application was dismissed by the Judicial Commissioner ('JC'). Subsequently, upon the E respondents' application, the JC granted a stay of the order refusing the judicial management. Hence, the appeal against the stay of 'no order'.

Held (allowing appeal; setting aside order of High Court)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

F **(1)** Section 409 of the CA, to some extent, restricts the company from abusing the process by seeking the judicial management order. However, the scheme does not safeguard the mischief of the company itself, as of right, in filing the application to freeze the claim of creditors for at least a short period until the disposal of the judicial management order. The G company, upon the dismissal of its application under s. 404 of the CA, obtained a stay of the dismissal, and was thus able to continue with the ordinary business thereby depriving creditors from taking any action. By granting the order for stay, in practical term, the High Court was entertaining the mischief without realising the jurisprudence and impact on the creditors. (paras 7 & 8)

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(2) The effect of making a judicial management order in relation to an insolvent company which may have no prospect of recovering money or assets within a reasonable time indeed may be very drastic. Thus, the court's consideration at all stages must be based on a strict proof and I evidence and not merely surmise and conjecture to ensure creditors were not defrauded by the sympathy evoking stories of insolvent companies.

The court must also justly, economically and expeditiously dispose of the application as well as any appeal process as s. 411 of the CA is heavily against even secured creditors. (para 9)

(3) The respondents filed an application under s. 404 of the CA and obtained the statutory interim relief and subsequently, when the application was dismissed by the court, successfully obtained the stay of 'no order'. The ingenuity of the respondents in obtaining the stay had brought s. 404 of the CA to live, and consequently, the respondents obtained a second bite at the cherry which gave the statutory interim protection again under s. 410 of the CA. There was an abuse of process of the court and the JC ought to have dismissed the stay application *in limine*. The moratorium regime related to s. 404 should not, in the first place, be entertained if the element of *bona fide* was not reflected in the application. One patent *bona fide* approach by the applicant under s. 404 was to write to all the concerned parties to obtain their views before the application was filed and also disclose the creditors' view to the court. (paras 10 & 15)

***Bahasa Malaysia** Headnotes*

Responden-responden memfailkan perintah pengurusan kehakiman bawah s. 404 Akta Syarikat 2016 ('Akta'), yang kesannya adalah menghentikan siapa-siapa sahaja daripada memfailkan tindakan terhadap responden-responden untuk tempoh enam bulan dan/atau seperti yang diperintahkan mahkamah. Walau bagaimanapun, permohonan ini ditolak oleh Pesuruhjaya Kehakiman ('PK'). Kemudian, atas permohonan responden-responden, PK membenarkan penangguhan penolakan perintah pengurusan. Oleh itu, rayuan ini terhadap penangguhan 'ketiadaan perintah'.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 409, sebahagiannya, menyekat syarikat daripada menyalahgunakan proses dengan memohon perintah pengurusan kehakiman. Walau bagaimanapun, skema tersebut tidak melindungi terus niat jahat syarikat dalam memfailkan permohonan membekukan tuntutan pemiutang sekurang-kurangnya untuk tempoh yang pendek sehingga pelupusan perintah pengurusan kehakiman. Syarikat, selepas penolakan permohonan bawah s. 404 Akta, memperoleh penangguhan penolakan, dan dengan itu, boleh meneruskan perniagaan secara biasa dan menafikan pemiutang-pemiutang daripada mengambil apa-apa tindakan. Dengan pemberian perintah penangguhan, secara praktikal, Mahkamah Tinggi melayan niat jahat tanpa menyedari jurisprudens dan kesan terhadap pemiutang-pemiutang.

(2) Kesan dalam memberi perintah pengurusan kehakiman kepada syarikat yang muflis yang mungkin tiada prospek mendapatkan semula wang atau aset-aset dalam tempoh munasabah sememangnya amat drastik. Oleh itu, pertimbangan mahkamah di setiap peringkat mesti berdasarkan bukti dan keterangan ketat dan bukan semata-mata tekaan dan agakan untuk memastikan pemiutang-pemiutang tidak ditipu oleh cerita-cerita untuk menimbulkan simpati oleh syarikat-syarikat yang muflis. Mahkamah juga mesti adil, cermat dan segera dalam melupuskan permohonan dan apa-apa proses rayuan kerana s. 411 Akta bersifat menentang walaupun terhadap pemiutang bercagar.

(3) Responden-responden memfailkan permohonan bawah s. 404 Akta dan memperoleh relief interim statutori dan kemudian, apabila permohonan tersebut ditolak mahkamah, berjaya memperoleh penangguhan 'ketiadaan perintah'. Kepintaran responden-responden memperoleh penangguhan menghidupkan s. 404 Akta, dan akibatnya, responden-responden memperoleh peluang kedua yang memberi perlindungan interim statutori terhadap s. 410 Akta. Berlaku penyalahgunaan proses mahkamah dan PK sepatutnya menolak permohonan penangguhan *in limine*. Rejim moratorium berkaitan s. 404, dari awal lagi, tidak sepatutnya dilayani jika unsur *bona fide* tidak ditunjukkan dalam permohonan. Salah satu pendekatan *bona fide* yang jelas oleh pemohon bawah s. 404 adalah menulis kepada semua pihak yang terlibat untuk memperoleh pandangan mereka sebelum permohonan difailkan dan mendedahkan pandangan pemiutang-pemiutang kepada mahkamah.

Case(s) referred to:
Ong Koh Hou v. Da Land Sdn Bhd & Ors [2018] 1 LNS 827 CA ***(dist)***

Legislation referred to:
Companies Act 1965 (since repealed), s. 176
Companies Act 2016, ss. 404, 405, 406, 407, 408, 409, 410, 411
Courts of Judicature Act 1964, s. 44

For the appellant - Jeyanthini Kannaperan, Marina Nasution & Pauline Koh; M/s Shearn Delamore & Co
For the respondents - Ramesh Kanapathy & Eldarius Yong; M/s Chellam Wong

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] This is an appeal by the appellant against the decision of the High Court where the learned Judicial Commissioner, upon dismissing the respondents' application under s. 404 of the Companies Act 2016 (CA 2016)

for judicial management order; subsequently, upon the respondents making an application for a stay of the order, the learned Judicial Commissioner granted an order to stay the order itself which refused the judicial management order. The appeal on the dismissal of the judicial management application is not before us. The appeal before us is limited to the stay of 'no order', related to the originating summons.

[2] The stay is rather unusual and when we asked the respondents whether there is any judicial precedent to stay an order of dismissal of an originating summons (OS) or writ itself, learned counsel for the respondents was candid and informed us that there was none, but attempted to convince us that they had made the application based on the Court of Appeal's decision in *Ong Koh Hou v. DA Land Sdn Bhd & Ors* [2018] 1 LNS 827; [2018] MLJU 778 (*DA Land*).

[3] After hearing the submission of the parties, we allowed the appeal and find it necessary to write this judgment to ensure that the *DA Land* judgment is not abused as it has nothing to do with stay of this nature. The stay in this case is unprecedented. The learned Judicial Commissioner also had not written the grounds of judgment for granting the stay.

Preliminaries

[4] The respondents in the instant case, had filed a judicial management order application on 6 August 2018. The effect of filing of the judicial management application means it effectively stops anybody from filing any action against the respondents for a period of six months and/or as the court may order. The filing itself in a way starts a moratorium not to sue the company. It is a strong weapon for the company to resist any form of claim against the company and a benevolent provision for creditors, etc. to appoint judicial managers to protect their interest in a company which may not be able to pay and/or satisfy their obligations. The said s. 404 of CA 2016 states that:

> Application to Court for a company to be placed under judicial management and for appointment of a judicial manager
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> 404. An application for an order that a company should be placed under a judicial management and for an appointment of a judicial manager may be made to the Court by the company or its creditor if the company or its creditor considers that:
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> (a) the company is or will be unable to pay its debts; and
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> (b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up.

[5] The other relevant sections to appreciate the effect and consequence of the judicial management order is found in ss. 405 to 411 of CA 2016. Even though s. 405 emphasises inability to pay debts and the making of the order

will salvage the company as a whole or partly; there is also another element added into it for the court to grant the order when an element of public interest requires to do so. The said s. 405 of CA 2016 reads as follows:

> Power of Court to make a judicial management order and appoint a judicial manager
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> 405. (1) Where a company or its directors, under a resolution of its members or the board of directors, or a creditor, including any contingent or prospective creditor or all or any of those parties, together or separately, makes an application under section 404, the Court may make a judicial management order in relation to the company if:
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> (a) the Court is satisfied that the company is or will be unable to pay its debts; and
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> (b) the Court considers that the making of the order would be likely to achieve one or more of the following purposes:
>
> (i) the survival of the company, or the whole or part of its undertaking as a going concern:
>
> (ii) the approval under section 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;
>
> (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.
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> (2) Upon hearing the application for a judicial management order, the Court may dismiss the application or adjourn the hearing conditionally or unconditionally or make an interim order or any other order that the Court thinks fit.
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> (3) Any judicial management order made under subsection (1) shall direct that during the period in which the order is in force, the affairs, business and property of the company shall be managed by a judicial manager appointed by the Court.
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> (4) The costs and expenses of any unsuccessful application for a judicial management order made under this section shall, unless the Court otherwise orders, be borne by the applicant and, if the Court considers that the application is frivolous or vexatious, the Court may make such orders to redress any injustice that may have resulted as the Court thinks just and equitable.
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> (5) Nothing in this section shall preclude a Court:
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> (a) from making a judicial management order and appointing a judicial manager if the Court considers the public interest so requires; or
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> (b) from appointing, after the making of an application for a judicial management order and on the application of the person applying for the judicial management order, an interim judicial manager, pending the making of a judicial management order, and such interim judicial manager may be the person nominated in the application and may exercise such functions, powers and duties as the Court may specify in the interim order.

(6) A judicial management order shall not be made in relation to a company after the company has gone into liquidation.

(7) For the purposes of this Subdivision, "property" in relation to a company includes money, goods, things in action and every description of property, whether real property or personal property, and whether in Malaysia or elsewhere, and also obligations and every description of interest whether present or future or vested or contingent arising out of or incidental to property.

(8) The definition in section 466 of "inability to pay debts" shall apply for the purposes of this section as it applies for the purposes of Subdivision 7 of Division 1 of Part IV.

[6] This regime does not allow *ex parte* orders to be made unlike the previous s. 176 of CA 1965, but requires the application to advertise as well as serve on interested person such as receiver, etc. of debenture holders. The said s. 408 of CA 2016 reads as follows:

Notice of application for judicial management order

408. (1) When an application for a judicial management order is made to the Court, the applicant shall cause the notice of the application:

(a) to be advertised in one widely circulated newspaper in Malaysia in the national language and one widely circulated newspaper in Malaysia in the English language; and

(b) to be given:

(i) to the company, in a case where a creditor is the applicant; and

(ii) to any person who has appointed or is or may be entitled to appoint a receiver or receiver and manager of the whole, or substantially the whole of a company's property under the terms of any debentures of a company.

(2) The applicant shall notify the Registrar of any application made under subsection (1) in the form and manner as determined by the Registrar.

[7] Section 409 of CA 2016 to some extent, restricts the company from abusing the process by seeking the judicial management order. What the scheme does not safeguard as of right is the mischief of the company itself, filing the application to freeze the claim of creditors, etc. for at least a short period until the disposal of the judicial management order.

[8] This case is a classic case where the company's application under s. 404 of CA 2016 upon being dismissed; the company by seeking a stay and having granted by the court, is able to continue with the ordinary business of the company thereby depriving creditors from taking any action. By granting the order for stay in practical term, the High Court is entertaining the mischief without realising the jurisprudence and impact on the creditors. The said ss. 409 and 410 of CA 2016 which can create the mischief read as follows:

A Section 409

Dismissal of application for judicial management order

409. Subject to subsection 405(5), the Court shall dismiss an application for a judicial management order if it is satisfied that:

B (a) a receiver or receiver and manager referred to in subparagraph 408(1)(b)(ii) has been or will be appointed; and

(b) the making of the order is opposed by a secured creditor.

Section 410

C Effect of application for a judicial management order

410. During the period beginning with the making of an application for a judicial management order and ending with the making of such an order or the dismissal of the application:

(a) no resolution shall be passed or order made for the winding up of
D the company;

(b) no steps shall be taken to enforce any charge on or security over the company's property or to repossess any goods in the company's possession under any hire purchase agreement, chattels leasing agreement or retention of title agreement, except with leave of the Court and subject to such terms as the Court may impose; and
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(c) no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with leave of the Court and subject to such terms as the Court may impose.

F **[9]** The effect of making a judicial management order in relation to an insolvent company which may have no prospect of recovering money or assets within a reasonable time indeed may be very drastic. Thus, the court's consideration at all stages, that is to say from the date the application is filed and from the date of the order, if any is given, must be based on strict proof and evidence and not merely surmise and conjecture to ensure creditors are
G not defrauded by sympathy evoking stories of insolvent companies. The court must also justly, economically and expeditiously dispose of the application as well as any appeal process, for the said s. 411 of CA 2016 is heavily against even secured creditors. Section 411 reads as follows:

H Effect of judicial management order

411. (1) Upon the making of a judicial management order:

(a) any receiver or receiver and manager shall vacate office; and

(b) any application for the winding up of the company shall be dismissed.
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(2) Where any receiver or receiver and manager has vacated office under paragraph (1)(a):

(a) the remuneration and expenses properly incurred by the receiver or receiver and manager; and

(b) any indemnity to which the receiver or receiver and manager is entitled out of the assets of the company, shall be charged on and, subject to subsection (4), paid out of any property which was in his custody or under his control at the time in priority to any security held by the person by or on whose behalf he was appointed.

(3) Neither a receiver nor a receiver and manager of a company who vacates office under paragraph (1)(a) shall be required to take steps to comply with any duty imposed on him by section 391 on or after so vacating office.

(4) During the period for which a judicial management order is in force:

(a) no resolution shall be passed or order made for the winding up of the company;

(b) no receiver or receiver and manager of the kind referred to in section 374 shall be appointed;

(c) no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with the consent of the judicial manager or with the leave of the Court and, if the Court grants leave, subject to such terms as the Court may impose;

(d) no steps shall be taken to enforce security over the company's property or to repossess any goods in the company's possession under any hire purchase agreement, chattels leasing agreement or retention of title agreement, except with consent of the judicial manager or leave of the Court and subject to such terms as the Court may impose; and

(e) no steps shall be taken to transfer any share of the company or to alter the status of any member of the company except with the leave of the Court and, if the Court grants leave, subject to such terms as the Court may impose.

[10] In the instant case, the respondents having filed an application under s. 404 of CA 2016 and having got the statutory interim relief, and subsequently when the application was dismissed by the court, had also successfully obtained the stay of 'no order'. The ingenuity of the respondents in obtaining the stay had brought s. 404 of CA 2016 to live. The consequence is that the respondents obtained a second bite at the cherry which gave the statutory interim protection again under s. 410 of the CA 2016. In our view, in jurisprudential term, it is indeed an abuse of process as complained of by the appellant. Learned counsel for the appellant on this submits *inter alia* as follows:

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3.3. It is submitted that a balance is necessary given the draconian effects of Section 410 of the Companies Act 2016 where despite the company is in admission of its inability to pay its debts, the directors of the company are allowed to continue to run the business of the company. This is in stark contrast to a Section 440 of the Companies Act 2016 where if directors of a company have made a statutory declaration that the
B company cannot by reason of its liabilities continue its business, the directors are required to 'forthwith appoint an approved liquidator' to be the interim liquidator after the statutory declaration has been lodged with the Registrar and with the Official Receiver pending the meeting of the company and/or of its creditors within 30 days from the date of the declaration.

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3.4 In this instance, it is important to note that after the Judicial Management Application was made on 3.7.2018, the Appellant did file an application to strike out the Judicial Management Application and/or alternatively for leave pursuant to Section 410(b) and (c) of the Companies Act 2016 and the Court, in dismissing the Judicial
D Management Application outright on 6.8.2018, brought the matter to an end. As no order was made to adjourn the hearing conditionally or unconditionally or any interim order was made at that juncture, the Appellant is left without any avenue or remedy as - the Court is *functus officio* and is no longer seized with any power to make any interim order, including an order to stay the dismissal of the Judicial Management
E Application.

3.5 It is therefore submitted that any stay of the dismissal of the Judicial Management Application falls outside the scope of the carefully balanced provisions in Part III, Division 8, Subdivision 2 of the Companies Act 2016 and results in an abuse of the judicial management process as this would
F effectively place the company in the hands of the Directors a company entirely immune from its creditors and/or legal proceedings for such extended period without any check or balance. Clearly this absurdity cannot have been the intention of Parliament especially when the purpose of this procedure is to allow a company in distress to gain statutory protection by giving up autonomous control in exchange of 'judicial
G management'.

3.6 It is submitted that apart from the above, the effect of the stay also makes a mockery of the Companies (Corporate Rescue Mechanism) Rules 2018 which requires that a hearing of any Judicial Management Application (therefore bringing to an end the effect of Section 410,
H Companies Act 2016) be fixed within 60 days of the date of the Application.

- Rule 9(1), Companies (Corporate Rescue Mechanism) Rules 2018 provides: "Upon receiving an application for a judicial management order under subrule 8(1), the Court shall fix a hearing date for the application
I on a date not later than sixty days from the date the application is filed"

[11] Learned counsel for the respondents, strongly relies before us on the case of *Ong Koh Hou v. DA Land Sdn Bhd & Ors* [2018] 1 LNS 827; [2018] MLJU 778 (*DA Land*) where the coram consisted of Hamid Sultan Abu Backer JCA, Hasnah Dato' Mohammed Hashim JCA and Harmindar Singh Dhaliwal JCA to argue that it is permissible under the jurisprudence related to 'positive orders can be stayed'. The respondents also relied on special 'circumstances rule' before the High Court. The submission of the respondents *inter alia* reads as follows:

> 29. The Appellant in their Memorandum of Appeal (see page 10-27 of Part A) contends, *inter alia*:
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> (a) The High Court was *functus officio* and therefore cannot hear the stay application;
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> (b) An order for stay cannot be granted in relation to an order dismissal;
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> (c) The Learned High Court Judge had erred in not considering that the "public interest" point raised by the Respondents is without merit;
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> (d) The Appellant would be prejudiced by the Stay Order by virtue of the following;
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> (i) Receiver and Manager had already been appointed;
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> (ii) The Directors of the Respondents could run and manage the business of the Respondents as they deem fit;
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> (iii) They are deprived of the recovery in relation to the financing agreement and debentures;
>
> (e) Abuse of Process; and
>
> (f) No special circumstances.
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> 30. We submit that the Appellant's argument that the High Court is *functus officio* cannot hold water as it is trite that any application for stay shall be made before the court of first instance and in this case, the High Court. This is also expressly provided under the Rule 13 and 14 of the Rules of Court of Appeal 1994 [Tab-7 of R-BOA]. Rule 14 provides that:
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> > Except as otherwise provided by any written law, whenever application may be made either to the High Court or to the court, it shall be made in the first instance to the High Court.
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> 31. In extension thereto, Section 73 of the Court of Judicature Act 1964 [Tab-8 of R-BOA] (hereinafter "the CJA") provides that: "An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct."

A 32. We submit that as an order for stay could be granted by the court below or the Court of Appeal, the High Court is appropriately clothed with the necessary jurisdiction to hear the application pursuant to Section 73 of the CJA and also Rule 14 of the Rules of Court of Appeal 1994. By the logic of the Appellant, no court of first instance would be able to hear an application for stay after delivering the final order or judgment. The High Court herein therefore cannot be said to have been *functus officio*.

33. The Appellant contended that any stay falls outside the scope of judicial management process as any stay of proceedings ends with the dismissal of the judicial management application. The Appellant is claiming that as the order dismissing the judicial management application is unenforceable and in essence is a negative order, a stay application could not be granted.

34. We submit that the Appellant's interpretation of the same is flawed. We submit that Section 410 of the Companies Act 2016 (hereinafter "the Act") [Tab-9 of R-BOA] provides a moratorium to the company making the judicial management application in order to protect the *status quo* of the company. The protection is also accorded to the company to make sure that any application for judicial management will not be hindered or made futile by any legal proceedings, including but not limited to winding up because the same would defeat the purpose as stipulated in Section 405 of the Act.

35. On the facts, the Respondents have already appealed against the decision of the Learned High Court Judge in dismissing the judicial management application. The dismissal of the Judicial Management Application has the effect of lifting all protection under Section 410 of the Act and by virtue of the same, allowing the Receiver and Manager to step in and sell the assets of the Respondents. Further thereto, it is emphasised that an appointment of Receiver and Manager will cause a termination of the concession. We submit that this is a negative order with a positive effect; a dismissal with an effect of enforcement. Therefore, the Learned High Court Judge had exercised her discretion to grant the stay. There is no error and/or misunderstanding in her consideration and/or application of the relevant laws.

36. In support of the above, we rely on the case of *Ong Koh Hou @ Won Kok Fong v. Da Land Sdn. Bhd. & 2 Ors* [2018] 1 LNS 827 [Tab-10 R-BOA], where this Honourable Court decided as such:

> [26] We do not think the principles of *Takako* is in relation to a declaration which does not change the *status quo* of the party, i.e. the declaration cannot be enforced directly or indirectly. In the instant case, the respondent has had an advantage over the order made by the High Court in that they were able to dispose of the property to third parties who were well aware of the dispute and that they may be liable to return the property in the event the appellant succeed in the appeal. In this respect, we agree with the submission of the learned counsel for the appellant who says:

The High Court misdirected itself when it applied *Takako Sakao v. Ng Pek Yuen (No. 3)* [2010] 1 CLJ 429: [2010] 2 MLJ 141 (FC) (Tab 7 IAP) when the judgment in that case does not contain positive order:

[6] There is an added point in so far as staying the effect of the principal judgment is concerned. All that judgment does, *inter alia*, is to hold that the appellant is a beneficiary under a constructive trust of which the second respondent is a trustee. In short it declares the existence of a constructive trust. It makes no positive order. The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution.

In *Prakash Chand v. SS Grewal* [1975] Cri LJ 679, the court held as follows:

A declaratory decree cannot be executed as it only declares the rights of the decree-holder *qua* the judgment-debtor and does not, in terms, direct the judgment-debtor to do or to refrain from doing any particular act or things. Since there is no command issued to the judgment-debtor to obey, the civil process cannot be issued for the compliance of that mandate or command.

In other words, there can be no committal or other execution process issued to enforce a declaration. Since a declaration cannot be enforced, no question of staying it may arise.

12. It is trite that if the judgment contains no positive orders, there is nothing to be executed and therefore nothing to stay. In support, the appellant refers to the decision of this Honourable Court in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49:

... The decision appealed against was the decision of the learned judicial commissioner striking out a prayer in the winding up petition. There was no order that a party was to do something. There was nothing to be executed, really.

13. However, in our case here, there are positive orders in the Order made by the High Court See exhibit CRH-1 of the respondents' affidavit in reply for the Order. A copy of the Order is attached hereto as Appendix A.

14. Besides (iv), the orders in (v) and (vi) of the Order are positive orders. They are positive orders directing the appellant to remove the private caveats and to deliver documents within a specific time. They are commands issued to the appellant to obey. Committal or execution process can be issued for the compliance of that command. That being the case, the appellant respectfully submits that the decision in *Takako Sakao* that an order which cannot be enforced cannot be stayed, does not apply in this case, especially in so far as the orders in (v) and (vi) are concerned.

37. The Appellant also contends that the Respondent had failed to prove "public interest" before the High Court and therefore no stay should be granted. We humbly submit that the "public interest" point is now before the Court of Appeal and the same question has never been decided by any appellate court in Malaysia. Further, it is trite that the High Court need not consider the merits of the appeal. With respect, we submit that the Learned Judge had considered the stay application on nugatoriness as can be seen from the respective affidavits filed by the Appellant and the Respondents.

38. The Learned High Court Judge had therefore granted stay in reliance on established principles *vis-a-vis* stay as submitted in paragraph 13 to 29 above.

Brief Facts

[12] The brief facts of the case as summarised before us in a rudimentary manner is set out and to save judicial time, we repeat and it reads as follows:

1. The 1st respondent is a company that was in the business of telecommunication services. It is a wholly owned subsidiary of Wellcom Sdn Bhd. The issued and paid up capital of the 1st respondent is RM500,000.00.

2. Whereas the 2nd respondent is a state backed company and ran a one stop-centre for telecommunication services.

3. On 30.3.2005, the 2nd respondent was awarded to be the sole concessionaire for a term of 30 years for the development of telecommunication infrastructures in the state of Negeri Sembilan. The concession includes planning, construction and maintenance of telecommunication structures.

4. It also grants the 2nd respondent ownership rights of the towers in the State post construction which will then be leased out to telecommunication providers by the 2nd respondent.

5. The 1st respondent is a special purposed vehicle formed for the purpose of obtaining financial facilities for all projects and contract procured by the 2nd respondent.

6. The respondents through its board of director's solutions dated 2.7.2018 respectively had decided to apply for a judicial management order and for an appointment of a judicial manager pursuant to section 404 and 405 of the Companies Act 2016.

7. On 6.8.2018 the high court judge dismissed the respondent's Judicial Management Application with costs of RM1,000.00 to be paid to the Appellant.

8. On 7.8.2018, the respondents lodged an appeal to the court of appeal against the order dated 6.8.2018.

9. The respondents also filed an application for stay of execution of the 6.8.2018 order pending the appeal.

10. On 8.8.2018, the high court judge allowed an interim stay pending hearing the application on its merits. In this respect, the Receivers & Managers (R&M) appointed over the undertaking and assets of the 1st and 2nd respondents informed the appellant that by reason of the Interim Stay Order, the R & M continue to remain unable to act.

11. On 30.8.2018, the high court judge allowed stay of execution of order dated 6.8.2018 on a condition that:

a. The *status quo* of the respondents assets be maintained as per the Respondents Facility Agreements and Debentures entered between the Respondents and the Appellant such that the respondents are restrained from altering the scope of their business operations changing its management structure such that its business operations are managed by any other party or otherwise ceasing to have control of all part of its lands, business or assets or the respondents by any other manner or method share or seek to share its income or profits with any other party, without the prior written consent of the appellant.

12. Dissatisfied with the above decision the appellant appealed to this court.

[13] The memorandum of appeal of the appellant reads as follows:

1. The Learned High Court Judge erred in allowing stay of execution of the Court Order dated 6.8.2018 (which dismissed the Respondents' Judicial Management Application) ("6.8.2018 Order") pending disposal of the Respondents' Appeal to the Court of Appeal against the said 6.8.2018 Order ("the Stay Order").

2. The Learned High Court Judge failed to appreciate that there was no basis for any stay of the 6.8.2018 Order dismissing the Respondents' Judicial Management Application under Part III, Division 8, Subdivision 2 of the Companies Act 2016:

2.1 any stay of the 6.8.2018 Order dismissing the Judicial Management Application falls outside the scope of the carefully balanced provisions in Part III, Division 8, Subdivision 2 of the Companies Act 2016 and results in an abuse of the judicial management process.

2.2 with the dismissal of the Judicial Management Application on 6.8.2018 (with no adjournment of the hearing conditionally or unconditionally or an interim order or any other order made pursuant to Section 405(2) of the Companies Act 2016), the matter was brought to an end and the Court was *functus officio* and was no longer seized with any power to make any order to stay the 6.8.2018 Order.

2.3 the Stay Order contradicts Section 410 of the Companies Act 2016 which provides that the stay of all proceedings and enforcement of securities from the filing of a Judicial Management Application ends with the dismissal of such Application.

3. The Learned High Court Judge erred in not holding that the special circumstances of "public interest" and "disruption" relied on by the Respondents were unsubstantiated and therefore not established as grounds for any stay of the 6.8.2018 Order.

4. The Learned High Court Judge failed to appreciate that in any event, she had dismissed the Judicial Management Application on 6.8.2018 for *inter alia* the Respondents failing to establish "public interest" when Receivers and Managers had been appointed over the Respondents and when the Appellant, a secured creditor of the Respondents opposed the Judicial Management Application.

5. The Learned High Court Judge failed to appreciate that:

5.1 the Respondents' Appeal to the Court of Appeal against the 6.8.2018 Order is not a sufficient ground to warrant stay of the 6.8.2018 Order and that an appeal does not operate as a stay.

5.2 the alleged merits of the Respondents' Appeal against the 6.8.2018 Order are not factors to be considered by Court in hearing the Stay Application.

5.3 in any event, there are no "merits" in the Respondents' Appeal against the 6.8.2018 Order.

6. The Learned High Court Judge failed to appreciate that by reason of the Stay Order, the Appellant, a secured creditor of the Respondents was severely prejudiced as:

6.1 the *status quo* subsisting prior to the Judicial Management Application and the Stay Order was that Receivers and Managers had been appointed by the Appellant on 6.6.2018. Whilst the Receivers and Managers were restrained by reason of an *Ex-Parte* Injunction obtained by the Respondents on 8.6.2018 in Kuala Lumpur High Court Suit No. WA-22NCC-214-06/2018, such Orders were set aside on 2.7.2018 with the Respondents filing on the next day, 3.7.2018 their Judicial Management Application. The dismissal of the Judicial Management Application on 6.8.2018 ought to have allowed the Receivers and Managers to act and discharge their duties.

6.2 with the Stay Order, the Respondents' directors were at liberty to run and manage the Respondents as they see fit.

6.3 The Appellant stand deprived from exercising its rights under the Financing Agreement and Debentures to recover the sums due and payable under the Financings availed to the 1st Respondent including the recovery action commenced in Kuala Lumpur High Court Suit No. 22M-254-06/2018 despite the clear admission by the Respondents of their "inability to pay" their financings and a default by the Respondents under the Financings causing the sum of RM130,261,040.63 to be due and payable as at 30.4.2018 with *ta'widh* (compensation) for late payment continuing and costs.

7. The Learned High Court Judge erred in not holding that the Respondent's application for stay of the 6.8.2018 Order is an abuse of process of the Court and the Judicial Management Mechanism in particular Sections 409 and 410 of the Companies Act 2016.

8. The Learned High Court Judge erred in holding that that there are special circumstances warranting any stay of the 6.8.2018 Order.

[14] We have read the appeal records and the able submissions of learned counsel. After giving much consideration to the submission of the learned counsel for the respondents, we took the view that the appeal has merit. Our reasons *inter alia* are as follows:

(i) In the instant case, the respondents have appealed against the dismissal of the (OS) itself. That appeal is not before us. The respondents' summary in relation to the dismissal of the (OS) read as follows:

3. The 1st Respondent is a company incorporated under the laws of Malaysia with its registered address at 705, 7th Floor, Block B, Kelana Entrepreneurs Exchange, Kelana Square, Kelana Jaya, 47301, Petaling Jaya, Selangor. At all material times, the 1st Respondent was in the business telecommunication services. The 1st Respondent is a wholly-owned subsidiary of Wellcom (M) Sdn. Bhd. (hereinafter "the Parent Company"). The issued and paid up capital of the Company of the 1st Respondent is RM500,000.00.

4. The 2nd Respondent is a state backed company incorporated under the laws of Malaysia with its registered address at Wisma Great Eastern Life, 2nd Floor, Nos. 107 & 109, Jalan Yam Tuan, 70000 Seremban, Negeri Sembilan. At all material times, the 2nd Respondent was in the business as a one stop centre for telecommunication services. The 2nd Respondent is a joint venture company between the 1st Respondent and the Menteri Besar Incorporated (hereinafter "the MBI"). The issued and paid up capital of the 2nd Respondent is RM500,000.00.

5. On or around 30.3.2005, the 2nd Respondent was awarded to be the sole concessionaire for a term of 30 years for the development of telecommunication infrastructures in the state of Negeri Sembilan (hereinafter "the State"). The duration of the concession shall be from year 2005 to 2035. The concession includes, *inter alia*, planning, construction and maintenance of telecommunication structures.

6. The concession also grants the 2nd Respondent ownership rights of the towers in the State post construction which will then be leased out to telecommunication (hereinafter "Telco") providers by the 2nd Respondent. The 2nd Respondent's major Telco customers include YTL Telecommunication (33%), Digi (24%), Celcom (19%), Maxis (14%), U Mobile (7%) etc. to provide networks to the same.

7. The 1st Respondent is a special purpose vehicle formed for the purpose of obtaining financial facilities for all projects and contract procured by the 2nd Respondent.

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8. The Respondents through its board of director's resolutions dated 2.7.2018 respectively had decided to apply for a judicial management order and for an appointment of a judicial manager pursuant to Section 404 and 405 of the Companies Act 2016.

9. On 2.8.2018, the Court upon hearing the parties reserved its
B decision on the Originating Summons to be delivered on the 6.8.2018.

10. On 6.8.2018, the Learned Judge had dismissed the Respondents' Originating Summons on the grounds that the Respondents' have failed to satisfy the "public interest" criteria
C stipulated in Section 405(5) of the Companies Act 2016 (hereinafter "the Act").

11. On 7.8.2018, the Respondents made an application for stay against the Learned High Court Judge's order to dismiss the Judicial Management Application. The stay order was granted with the condition that the Respondent maintain its *status quo* in regards
D to its assets.

(ii) The respondents were not able to produce one authority to say that once an originating process is dismissed, the court could grant a stay to keep the originating process alive. In our view, such an order is unprecedented. The case of *DA Land* does not support such a
E proposition. *DA Land* relates to orders given by court and where there is an appeal on the order and the appellant intends to make an application to stay the order pursuant to s. 44 of CJA 1964. *DA Land* is not authority for the proposition to stay the dismissal of originating process.

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[15] In the instant case, we have demonstrated that there is an abuse of process of court and the learned Judicial Commissioner ought to have dismissed the stay application *in limine*. This moratorium regime related to s. 404 of CA 2016 should not in the first instance be entertained if the element of *bona fide* is not reflected in the application. One patent *bona fide*
G approach by applicant under s. 404 of CA 2016 is to write to all the concerned parties to obtain their views before the application is filed itself and also disclose to the court the creditors' view.

[16] This is a fit and proper case to allow the appeal and set aside the stay
H order of the High Court.

[17] The appeal was allowed with agreed costs of RM15,000 here and below subject to allocator fees. The order of stay of the High Court is set aside. Deposit to be refunded.

We hereby ordered so.

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